

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL **77-4194** 1-27-78

To be argued by
THOMAS J. LILLY

United States Court of Appeals
For the Second Circuit

Docket No. 77-4194

NEW YORK PRINTING PRESSMEN AND OFFSET WORKERS
UNION, NO. 51, INTERNATIONAL PRINTING AND
GRAPHIC COMMUNICATIONS UNION, AFL-CIO,

and

LOCAL NO. 23, NEW YORK PRINTING ASSISTANTS AND
OFFSET WORKERS, INTERNATIONAL PRINTING AND
GRAPHIC COMMUNICATIONS UNION, AFL-CIO,

and

LOCAL 1, INTERNATIONAL PRINTING AND GRAPHIC
COMMUNICATIONS UNION, AFL-CIO,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ARKAY PACKAGING CORPORATION,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF ON BEHALF OF PETITIONERS

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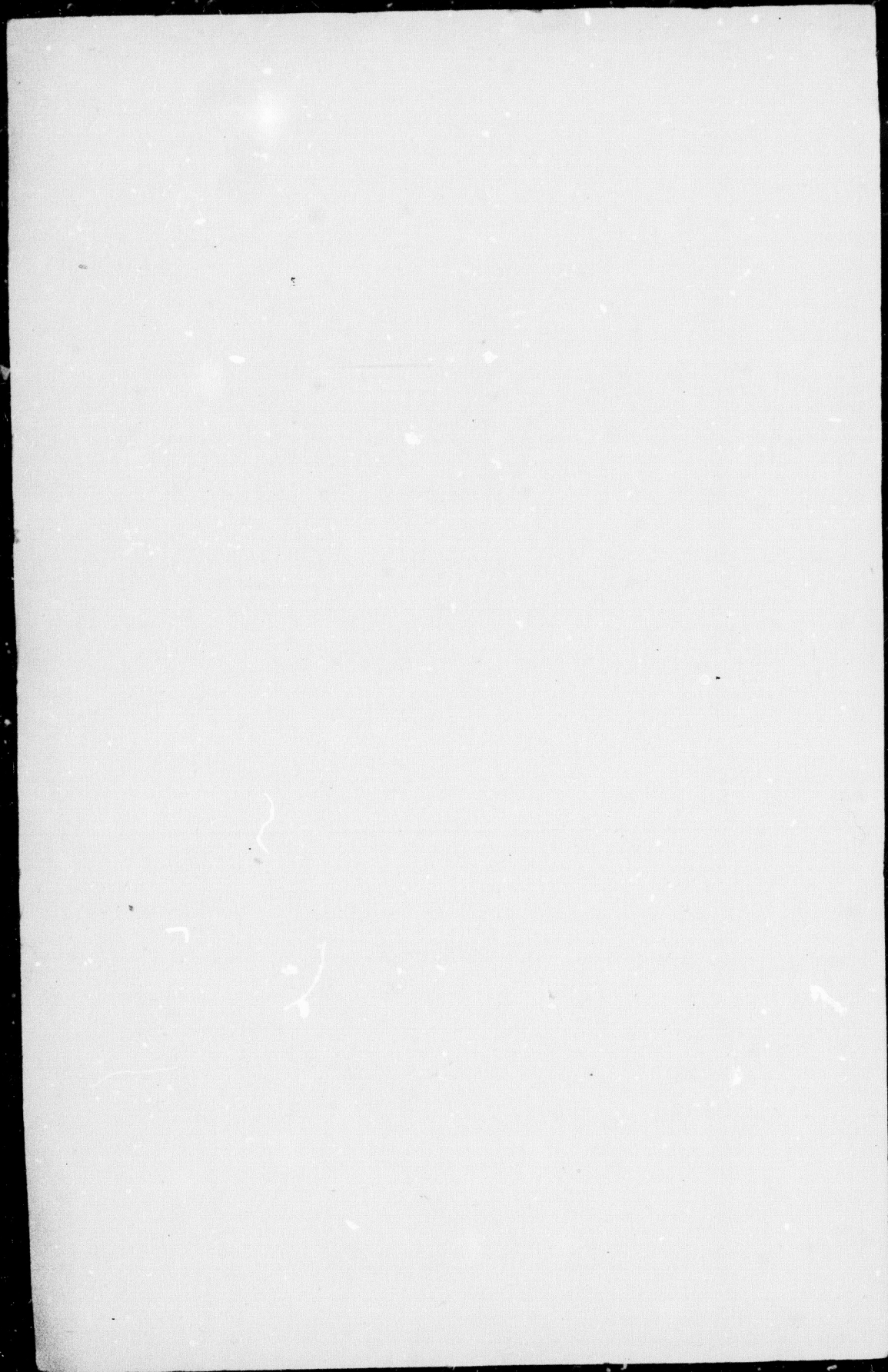


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Statement of Issue

Was the National Labor Relations Board ("Board") justified, by substantial record evidence, in dismissing the

complaint and refusing to find an unfair labor practice, where the employer refused to bargain with the unions during the terms of their existing collective bargaining agreements, based on the employer's presumption that the unions had lost their majority status?

Statement of the Case

Preliminary Statement

Petitioners (herein referred to as "Unions") seek review of a decision by the Board dismissing a complaint, which alleged that the employer (herein also referred to as "Arkay") had violated Sections 8(a) (1) and (5) of the National Labor Relations Act, as amended (hereinafter referred to as "Act") 29 U.S.C. 158(a) (1) and (5). *Arkay Packaging Corporation*, 227 NLRB No. 59 (1976).

Members John A. Penello and Peter D. Walter joined in the Board decision. Member Howard Jenkins, Jr. dissented. Petitioners contend that the dismissal of the complaint is not supported by substantial evidence on the record.

Statement of the Facts

The employer is engaged in the manufacture, sale and distribution of paper cartons, wrapping materials, labels and related products. (A. 4a)* Petitioners are three labor organizations (A. 5a) which have represented, for a number of years, a variety of employees at the employer's facility in Hauppauge, New York. Until 1974, the employer had

* "A" references are to the Appendix to the briefs.

entered into collective bargaining agreements with the petitioners through its membership in the Printers League Section of the Printing Industries of Metropolitan New York, an association of printing industry employers (A. 118a-119a, 168a-1-168a-3, 246a-251a, 257a-269a, 279a-285a).

In the Spring of 1974, Arkay withdrew from the Printers League and negotiated separate one year agreements with each of the petitioner unions. Local 51's contract expired March 3, 1975 (A. 121a, 252a), Local 23's on April 30, 1975 (A. 168-7a, 273a), and Local 1's on April 30, 1975 (A. 194a, 286a-287a).

Arkay was picketed by Local 119B in support of its economic demands, commencing on June 10, 1974 and continuing up to the time of the NLRB hearing in this matter (A. 42a, 59a).

Initially, the 17 or 18 members of the petitioner unions employed by Arkay continued to report to work by crossing the picket line maintained by members of Local 119B (A. 66a, 73a, 94a-95a, 125a, 197a). Following a series of harassing incidents, intimations of violence, and vandalized automobiles, (A. 44a-45a, 74a, 77a, 131a) the employees represented by the petitioners convened outside the employer's premises. They decided among themselves, notwithstanding the admonition of their union officials that each of their unions was contractually committed to honor a "no strike" clause, that they would no longer risk running the picket line of Local 119B (A. 75a-77a, 89a-90a, 113a-114a, 173a-176a). This decision by the employees not to cross the picket line was communicated to the employer by the petitioners (A. 101a-102a, 134a). Following this decision of July 1, 1974, through the NLRB hearing, (A. 108a) these employees represented by petitioners, with one notable exception, ceased to report to work or to have any contact

with the employer, although the employer had sent mailgrams to each employee stating that they would be replaced if they did not report to work by July 8 (A. 551-59a, 244a, 245a). A communication was also addressed to each petitioner by the employer stating that the employer would be "free to replace" members of the unions not returned to work by July 8, (A. 243a, 274a, 288a). Only one employee represented by the petitioners continued to cross the Local 119B picket line and work after July 1. The employer continued to make appropriate wage deductions for this one employee in order to pay his union dues to Local 51. Additionally, the employer continued to make pension and welfare contributions on his behalf, up to the time of the NLRB hearing herein, all in accord with the then current collective bargaining contract with Local 51 (A. 144a, 228a-229a).

Arkay, pursuant to its aforementioned notice, did hire eleven replacements for the absented employees, but notification of the actual hiring of replacements was not communicated to the petitioners (A. 210a-213a, 153a).

Each contract with the petitioner unions had a union shop clause, which required new employees to join the union after a stipulated grace period of 30 days (A. 142a-143a, 248a, 259a, 279a-280a).

The next communications between the employer and the petitioners were timely written notifications by each of the unions (Local 51 on January 23, Local 23 on March 31 and Local 1 on April 5), advising the employer that the current agreements were about to terminate, and requesting negotiations for a new agreement. The employer response to each request stated that the employer refused to bargain for a new contract, since it doubted that each of the unions continued to represent a majority of the employees sought to

be represented in collective bargaining. The employer stated that it was withdrawing recognition of the unions as bargaining agents based on "valid, objective considerations" (A. 140a-142a, 254a, 255a, 178a-186a, 272a, 276a, 201a-203a, 289a-291a).

The Administrative Law Judge ("ALJ"), in his decision, found that the unions' rebuttable presumption of majority status had been overcome by the aforementioned events that followed the July 1 refusal to cross the Local 119B picket line. Nevertheless, the ALJ went on to find that a majority of employees, in fact, still favored representation by the petitioners. This conclusion was based on a presumption by the ALJ that the replaced striking employees continued their support of their respective unions, and that the striker replacements did not support the unions. Since the number of striking employees exceeded the number of striker replacements, the ALJ concluded the unions still had majority status, and the employer had unlawfully refused to bargain (A. 30a-31a).

The two member majority of the Board (Penello and Walther), in effect, reversed the ALJ decision by dismissing the complaint on the grounds that (a) the employer should not be charged "in fact or in law" with a belief that the eleven striker replacements desired to be represented by the petitioners, and (b) not having heard from the 17 or 18 strikers since July 1974, the employer could reasonably question their desire, in early 1975, to be re-employed or to be represented by the petitioners (A. 16a-17a). After making these determinations, the majority concluded that the employer "did have an objective basis for a reasonably based doubt as to the unions' continued majority status". Once having reached that conclusion, the majority decided that the employer had a complete defense to the alleged

refusal to bargain, rendering immaterial the finding of the ALJ of actual majority status of the unions (A. 17a).

The dissenting Board Member (Jenkins) would have found that the unions continued to enjoy the presumption of majority status on the basis of their continuing effective contracts (A. 20a); that the approximately seven month period of lack of union communications with the employer did not overcome this presumption, nor was it overcome by an unfounded presumption that the striker replacements did not prefer union representation (A. 21a-22a).

The dissenting opinion concluded by stating that the employer "failed to present valid objective considerations sufficient to support a reasonable doubt of each union's continued representative status." (A. 24a)

ARGUMENT

POINT I

The unions' right to recognition, based on their contractual status, was not conditioned on an acceptable degree of union activism or militancy.

The National Labor Relations Act, as amended, specifically Section 8(a)(5), 29 USC 158 (a)(5), makes it an unfair labor practice for an employer to refuse to collectively bargain with a majority representative of its employees. There is no disputing that the employer, Arkay, purposefully refused to bargain when requested to do so by the petitioners. The sole question was, and is, whether the employer had legally sufficient grounds to doubt that the unions enjoyed majority status at the critical point in time, early 1975, when each of the petitioners requested negotiations for a new contract. The objective basis for this doubt by the employer, according to the Board major-

ity, rested on two presumptions: (a) that the unions had abandoned any majority status, based on their respective contracts, by failing to communicate with the employer for several months following the walkout of their members on July 1, 1974, and (b) that the strikers and their replacements did not desire to be represented by the unions. Petitioners urge that both presumptions are contrary to prior Board and judicial decisions, and together with the dissenting Board member, the unions urge that the objective reasons of the employer for refusing to bargain were legally insufficient.

The conditions under which an employer is required to recognize and bargain with a collective bargaining representative are set forth in the Board's rule making decision, *Celanese Corporation of America*, 95 NLRB 664, 671, (1951). Simply stated, the ground rules for recognition are: (a) that the majority status of a union, which has been certified as the majority representative following a Board conducted election, is irrebuttably presumed to continue for one year from the date of certification; (b) following the initial certification year, the presumption of majority status is rebuttable and "the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, *provided* that the doubt is in *good faith*." P. 672.

The *Celanese* rule has been recognized as appropriately within the administrative jurisdiction of the Board, *Brooks v. NLRB*, 348 U.S. 96, 104 (1954) and has received judicial approval.

"It is well settled that in the absence of special circumstances a union's majority status is irrebuttably presumed for a period of one year following the union's certification by the Board as collective

bargaining agent. We think it is also true that upon the expiration of the certification year, the presumption of majority status continues but becomes rebuttable even in the absence of special circumstances . . . any doubt as to the continuing majority status must rest on a reasonable basis and may not depend solely upon unfounded speculation or a subjective state of mind." *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588, 589, 5th Cir. (1966). See also *Terrell Machine Company v. N.L.R.B.*, 427 F.2d 1088, 4th Cir. (1970); *cert. den.* 398 U.S. 929 (1970).

In addition to endorsing the *Celanese* rule, the Second Circuit has cautioned that the rule was not intended to encourage employers to cease bargaining after the certification year, and where an employer does cease bargaining, he must be prepared to meet a high standard of proof to justify his actions. *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 491, 2d Cir. (1975).

In the present circumstances, petitioners rest their claim to majority status and recognition as bargaining agent, not on their Board certification, but rather, on their long-standing contractual relationship with Arkay. Accordingly, the unions enjoyed a rebuttable presumption of majority status throughout the life of their contracts, and the employer was obligated to bargain on a new contract when the old contracts expired. Again, under the terms of the *Celanese* rule, that presumption is overcome where: (1) the union no longer represented a majority, or (2) the refusal to bargain was predicated on the employer's good faith doubt, reasonably grounded, of the union's majority status. *Bartenders International Union, AFL-CIO*, 213 NLRB 651 (1974). See also *Shamrock Dairy Inc.*, 119 NLRB 998, 1002 (1957) and 124 NLRB 494 (1959), *enf'd.* 280 F.2d 665 D.C. Cir. (1960), *cert. den.* 364 U.S. 892.

In their determination that Arkay had an objective basis for a good faith doubt, since there was approximately a seven month hiatus of union activity, the Board acted mechanically and inconsistently with their own guide lines. By condoning the employer's withdrawal of union recognition, during the term of the collective bargaining agreements, the Board disregarded the realities of the strike situation and offended the union's basic contract rights.

As of July 1, 1974, the petitioners' members had refused to cross the Local 119B picket line for reasons of personal safety. Thereafter, the employer did not notify the unions that it had hired replacements, as implicitly required by the union security provision of the union contracts. In the face of the union members absenting themselves, and the lack of notice that replacements had actually been hired, there simply was no justifying reason for the unions to communicate with the employer during the hiatus in order to preserve their bargaining rights. However, as each of the unions' contracts were approaching their expiration dates, there was justifying reason to communicate with the employer, and accordingly, in February, March and April of 1975, each of the unions, respectively, made a timely request that the employer negotiate a new agreement. This union course of conduct is irreconcilable with a theory of contract abandonment. Even the employer, during this "hiatus" period, and through the NLRB hearing, acknowledged the continued viability of the union contracts by continued wage deductions for union dues, and pension and welfare contributions on behalf of the single union member employed throughout the strike period.

By ignoring the context of this period of union inactivity, and mechanically imposing the penalty of revoking the unions' right to recognition, the Board disregarded its own established rules. *Pioneer Inn Associates*, 228 NLRB No.

160 (1977), contained a restatement of the *Celanese* doctrine in the context of an alleged contract abandonment. In that "refusal to bargain" case, the Administrative Law Judge found that the contract and covered employees were abandoned by the union from 1971 to January 1975, relying on the fact that there were no union negotiations during that period. The Board reversed the A.L.J., criticizing his failure to abide by the presumptions of majority status inherent in the union's contractual relationship with the employer.

"Clearly then, the lack of any basis for finding the contract to be invalid calls into effect the long established Board presumption of the union's majority status during the term of the contract, irrespective of the degree to which the union may or may not have been deficient in the administration of the agreement.

"Moreover, even if one were to examine Board precedent as to which a union is 'defunct' . . . it is clear that to preserve the viability of its agreement for contract bar purposes, a recognized union need only show that it is willing and able to represent the covered employees at the time its status is called into question."

The Board went on to comment that the lack of union activity could be attributable to a harmonious relationship between the union and the employer, or the failure of the employees to avail themselves of union assistance.

Certainly, there is nothing in the present record to indicate that the unions were unwilling or unable to carry out their collective bargaining responsibilities. There was present, on the other hand, exculpatory strike conditions which readily explained the absence of overt union activity

at the employer's premises. The Board has, in the past, acknowledged, with judicial approval, that a period of ten months silence by itself, is not an adequate basis to assert a good faith doubt concerning majority status, but rather, the circumstances of the inactivity must be considered as possibly justifying the hiatus. *Leatherwood Drilling Company*, 209 NLRB 618 (1974), enforced as *NLRB v. Leatherwood Drilling Company*, 513 F.2d 270, 5th Cir. (1975). See also *Industrial Wire Products Corp.*, 207 NLRB 96 (1973), a four month period of union inactivity did not support a good faith doubt of majority status or indicate that the union had abandoned its bargaining agent role.

Rather than applying a mechanical test, measuring the time period of relative union inactivity, an examination of the extenuating circumstances would have been more appropriate, together with a test as to whether the unions were "willing and able" to represent the employees. There is no evidence that the unions were not "willing and able", on the contrary, by their request for negotiations during the term of their existing agreements, they demonstrated that they were "willing and able" to exercise their collective bargaining rights.

POINT II

The presumption that the strikers and their replacements did not desire union representation is not supported by Board or judicial authority.

The Strikers

The Board decision that the unions had lost their majority status is founded on a presumption that the strikers had abandoned their employment and their union, based on the absence of any communication with the employer following the employees honoring the picket line and refusal to work

after July, 1974. As was pointed out by the ALJ, and not disputed by the Board, the employees, in honoring the Local 119B picket line, became "economic" strikers. In the absence of any evidence that they repudiated their union representatives, the employer was obligated to count the strikers as union adherents in determining the majority status of the unions. *Crimptex, Inc.*, 211 NLRB 855 (1974), aff'd. 517 F.2d 501, 1st Cir. (1975). See also *C. H. Guenther & Son, Inc.*, 174 NLRB 1202 (1969); aff'd. *C. H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983, 5th Cir., (1970), where the Board, after ruling that replaced "economic strikers must be included in the accounting for majority status of the union", further observed, regarding the National Labor Relations Act:

"The legislative history of the amended provision strongly suggests that it was the intent of Congress in amending Section 9(c) (3) that in an economic strike of not more than 12-month duration, replaced strikers should be considered as members of the bargaining unit for purposes of determining the union's majority status."¹

It should also be observed that the employer would not be free to discharge these strikers, because their refusal to work was based on their sympathy with, or fear of, other strikers, as this is a protected activity. *Hoffman Beverage Co.*, 163 NLRB 981 (1967). Here the Board refused, contrary to the statutory scheme, to include the economic

¹ Section 9(c) (3), 29 U.S.C. 159(c) (3) of the Act states: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike . . ."

strikers, not after a 12-month strike, but after a seven-month period of a silent strike, without any affirmative evidence that the employees had abandoned their jobs or their union. Petitioners urge that, since the record here is absolutely void of any affirmative evidence that the strikers either rejected their union, or expressed disinterest in their continued employment, the Board was unwarranted in failing to include them, in determining the majority status of the unions, in accord with long standing Board adjudicative precedent and congressional statutory design.

The Striker Replacements

Assuming, *arguendo*, that the Board should have included the strikers in the majority status accounting, then the petitioners would have established their majority status in each of their respective units, regardless of the union sentiments of the replacements, whom the strikers outnumbered. By including the strikers in the accounting, there is no basis for a reasonable doubt as to the unions' majority status, even assuming, as the Board did, that all the replacements opposed union representation.

The conclusion by the Board that the striker replacements did not desire to be represented by the unions, is totally based on an unprecedented presumption, unaided by any objective record facts. The Board has previously ruled that an opposite presumption should be operative.

“Employee turnover standing alone, does not provide a reasonable basis for believing that the union had lost its majority since the prior election. The Board has long held that new employees will be presumed to support a union in the same ratio as those whom they have replaced.” *Laystrom Mfg. Co.*, 151 NLRB 1482 (1966); *revs.’d on other grounds, NLRB v. Laystrom Mfg. Co.*, 359 F.2d 799, 7th Cir. (1966).

More recently the Board has reinforced the *Laystrom* presumption in a strike situation very similar to the instant case. In that case, directly contrary to this case, the Board stated that there is no presumption that employees who elected not to support a strike have rejected the union; further, the Board stated, with apparent reference to striker replacements, that the new employees are presumed to support the union in the same ratio as those whom they have replaced. *Surface Industries, Inc.*, 224 NLRB 155 (1976). Similarly, in *Top Mfg. Co.*, 230 NLRB No. 130 (1977), the Board ruled that in testing for majority status, permanently replaced strikers must be counted as employees, and striker replacements, as new employees, are presumed to support the union in the same ratio as the employees they replaced. See also, *James W. Whitfield, d/b/a Cutten Supermarket*, 220 NLRB 507 (1975). The Board's position in these cases is irreconcilable with its position here, which the Board justifies by reference to *Peoples Gas System, Inc.*, 214 NLRB 944 (1974). The Board's central reliance on *Peoples Gas*, *supra*, seems particularly inappropriate, since that Board decision was reversed by the Court of Appeals, *Teamsters Local Union 769 v. National Labor Relations Board*, 532 F.2d 1385, D.C. Cir. (1976) in an opinion, which suggested dissatisfaction with a presumption that striker replacements did not support the union. The Court noted, that the Board in concluding that the employer had an objective basis for doubting the union's continuing majority status, relied in part, on a 40% permanent replacement of the work force during a strike, as providing a basis for presumption of loss of union support. The court then commented that the petitioner-union had not questioned whether the Board's assumption, that striker replacements are less likely to support a union than strikers, could be reconciled with several earlier

Board decisions "all holding that strikebreakers are *not* presumptively anti-union." Emphasis not supplied (Page 1391, fn. 20).

In any event, in finding a good faith doubt in *Peoples Gas*, the Board had more substantial factors to rely on than merely the fact that some employees crossed their own union's picket line. Here, the petitioner unions did not maintain a picket line and made no effort to prevent new employees from working, hence there was no picket line test of new employee support for the petitioner-unions. The Board has also previously recognized the reality, that new employees may be reluctant to join the union, but nevertheless favor representation by the union. *Printers Service Inc.*, 175 NLRB 809 (1969), *aff'd*. 434 F.2d 1049, 6th Cir., (1970). Similarly, this court has recognized that the failure of employees to join in, or support a particular strike or policy, does not establish that the employees do not wish to be represented by the union. *Nazareth Reg. High School v. NLRB*, 549 F.2d 873, 2d Cir., (1977).

The employer here sought to deprive the unions of a substantial contractual and statutory right to be recognized based on speculative unwarranted presumptions, and hence, it has assumed a heavy burden of proof, particularly since the employer had ready access to the election processes of the Board, which could have definitively resolved the question of majority status. See *Barrington Plaza*, 185 NLRB 962 (1970).

Conclusion

Petitioners request an Order of this court setting aside the decision and order of the Board, in so far as it dismissed the complaint, and in so far as it failed to find that the employer violated the Act by refusing to bargain with

the petitioners, based on legally insufficient presumptions that the petitioners had lost their majority status. Petitioners further request that this cause be remanded to the Board, for further proceedings consistent with a determination that the employer did violate the National Labor Relations Act in the described manner.

Dated: Garden City, New York
January 27, 1978

Respectfully submitted,

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THOMAS J. LILLY
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UNITED STATES COURT OF APPEALS

For the Second Circuit

Order No. 77-1194

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UNION, NO. 31, INTERNATIONAL PRINTING AND
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STATE OF NEW YORK }
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

FRANCO VELEZ, being duly sworn, deposes and

says, that he is over 18 years of age. That on the 27th day of

January, 1978, he served 2 copies of

the attached Brief on Behalf of Petitioners on

the attorneys for the Respondent and Intervenor

herein by depositing the same, properly enclosed in a securely sealed

post-paid wrapper, in a U. S. Post Office at 90 Church Street, New

York City, directed to said attorney

XX

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Washington, D.C. 20570

that being the place wheretheymaintain XX offices for the

regular transaction of business, and the last address mentioned in

the papers last served by them.

Franco Velez

Sworn to before me this

27th day of January, 1978.

Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4010000
Qualified in Kings County
Commission Expires March 30, 1979